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CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

No. 136

C AND C ICE CREAM COMPANY, Inc., - Petitioner,

VERSUS

EWING-VON ALLMEN DAIRY COMPANY,
NATIONAL ICE CREAM COMPANY, - Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE SIXTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF.

JOSEPH S. LAWTON,
JOSEPH SOLINGER,
CLAUDE HUDGINS,
Attorneys for Petitioner.



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[REFERENCES REQUIRED BY RULES 12 AND 27]

OPINION BELOW: Ewing Von-Allmen Dairy Company, Inc., *et al.*, v. C and C Ice Cream Company, Inc., 109 Fed. (2d) 898 (R., pp. 128-130).

JURISDICTIONAL AUTHORITY: Judicial Code 240 and 238 as amended by Acts February 13, 1925.

DATE OF JUDGMENT: February 15, 1940 (R., p. 127); petition for rehearing denied March 13, 1940 (R., p. 141).

QUESTIONS PRESENTED: Both petitioner and respondents were engaged in the manufacture and sale of ice cream in interstate commerce between the State of Kentucky and the State of Indiana. Respondents attempted to and did monopolize petitioner's business. The Sixth Circuit Court of Appeals held that this did not affect or burden interstate commerce, and the record contained no proof of conspiracy to restrain such commerce.

THE REASON RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI: The Sixth Circuit Court of Appeals' decision reversing this case is in direct conflict with the decisions of the Supreme Court of the United States and creates a conflict of decisions between the Circuit Courts of Appeals.

IN THE

Supreme Court of the United States

No. _____

C AND C ICE CREAM COMPANY, INC., - *Petitioner,*

v.

EWING-VON ALLMEN DAIRY COMPANY, INC.,

NATIONAL ICE CREAM COMPANY,

INC., - - - - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petitioner, the C and C Ice Cream Company, Inc., respectfully shows:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

In April, 1938, this petitioner was given a judgment in the United States District Court for the Western District of Kentucky at Louisville against the respondents the Ewing-Von Allmen Dairy Company, Inc., and the National Ice Cream Company, Inc., for \$6,000 damages to petitioner by reason of respondents' attempted monopolization of the ice cream busi-

ness in Louisville, Kentucky, which affected interstate commerce in and around Louisville, Kentucky, in violation of the Clayton Anti-Trust Act, Sections 1, 2 and 15, and also a judgment for \$750 attorneys' fee for petitioner's counsel.

That respondents appealed said action to the Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio and that on the 15th day of February, 1940, the said Circuit Court of Appeals for the Sixth Circuit entered a final order reversing said judgment, holding petitioner was not entitled to recover, and on March 13, 1940, said Court denied a petition for rehearing.

A certified copy of the entire record of said case in the said Circuit Court of Appeals is hereby furnished, attached to and made a part of this application and marked Exhibit "A" in compliance with Rule 35 of this Honorable Court.

Your petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of Section 240, Judicial Code.

II.

This case was decided in the United States Circuit Court of Appeals upon the erroneous idea:

(a) That the ingredients which came from without the state ceased to be a part of interstate commerce when manufactured into ice cream and were beyond

the regulatory powers of Congress over interstate commerce.

(b) Upon the erroneous idea that the attempt to monopolize the ice cream business did not create a direct and substantial burden on interstate commerce.

(c) That the ingredients used by the parties in the manufacture of ice cream shipped from out of the State of Kentucky into Kentucky are not affected by the monopolization of this business.

(d) Said Court erroneously held that the facts in this case were not shown in any way to affect interstate commerce, notwithstanding, the respondents used every unlawful tactic possible to put the petitioner out of business and attempted in the most ugly manner to obtain a monopoly on that business; both parties being engaged in interstate commerce and were also shipping a great part of the ingredients going into ice cream from out of the State into Kentucky.

(e) The said Court erred in holding that, "the record contained no proof of conspiracy to restrain such commerce."

(f) Said holdings were in direct conflict with the decision of the Supreme Court of the United States and should be set aside by this Court.

III.**JURISDICTION.**

This is a civil action for damages caused by a violation of the Clayton and Sherman Anti-Trust Acts, U. S. C. A., Title 15, Section 1, 2 and 15; date of judgment February 15, 1940, Petition for Rehearing denied March 13, 1940, and the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347).

IV.**PRAYER FOR WRIT.**

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Sixth Circuit in said case, entitled Ewing-Von Allmen Dairy Co., Inc., and the National Ice Cream Company, Inc., versus C and C Ice Cream Company, Inc., No. 8089, to the end that said case may be reviewed or that your petitioner may have such other or further relief or remedy in the premises as this court may deem appropriate and in conformity with said provision of the

Judicial Code and that the said judgment of the said Circuit Court of Appeals in the said case every part thereof may be reversed by this Honorable Court.

C AND C ICE CREAM COMPANY,
Petitioner,

JOSEPH S. LAWTON,

JOSEPH SOLINGER,

CLAUDE HUDGINS,

Attorneys for Petitioner.